89-1361



No._____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1989

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MIC MAC NATION,

Petitioner,

v.

DONALD JAMES GIESLER, et. al.,

Respondent.

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PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA

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## QUESTIONS PRESENTED

1. Is the administrative action by the Department of Interior, in creating a list of Indian tribes, the sole and only method by which an Indian tribe may be recognized for purposes of the Indian Child Welfare Act?

2. Does the definition of "domicile" require that a Mic Mac mother reside continuously, prior and subsequent to the birth of the Indian child, on reservation land within the United States?

3. Do the Jay, Ghent and Watertown treaties constitute recognition of the Mic Mac Indian Nation as an "Indian Tribe" for purposes of the Indian Child Welfare Act and its jurisdictional protections?

4. Does the Indian Child Welfare Act, as interpreted by the Appeals Court, violate the Jay and Ghent treaties by preventing the free flow of travel of the

Mic Mac Nation between the Canadian and United States of America borders?

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MIC MAC NATION

Petitioner,

v.

DONALD JAMES GIESLER, et. al.[1]

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

Petitioner Mic Mac Nation respectfully prays that a Writ of Certiorari issue to review the decision of Supreme Court of the State of California on February 21, 1990 denying review of the judgment by the California Court of Appeal, Second Appellate District,

[1] Other parties, See Appendix E at 65a.

Division One, said decision entered on November 30, 1989.

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## OPINIONS BELOW

The order denying review by the Supreme Court of the State of California was entered on February 21, 1990 is not reported, and is set out at 1a of the Appendix.

This order was rendered following a judgment by the Court of Appeal of the State of California, Second Appellate District, Division One, reversing and remanding with directions an earlier decision by Superior Court of Los Angeles County; this Court's Order has been certified for publication and is set out at 2a-41a of the Appendix.

The judgment of the Superior Court of Los Angeles County was entered on July 14, 1988 and is not reported, is set out at 42a-54a of the Appendix.

## JURISDICTION

The order of the Supreme Court of the State of California was entered on February 21, 1990. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. (§ 1254(1)).

## STATUTES INVOLVED

25 U.S.C. § 1911, subdivision (a) provides in pertinent part:

> "An Indian tribe shall have jurisdiction exclusive as to any state over any child custody proceeding involving an Indian child who resides or is domiciled within the reservation of such tribe, except where such jurisdiction is otherwise vested in the State by existing Federal Law. Where an Indian child is a ward of a tribal court the Indian tribe shall retain exclusive jurisdiction notwithstanding the residence or domicile of the child."

## TREATIES INVOLVED

The Treaty of Amity, Commerce and Navigation (Jay Treaty of 1794) provides

in pertinent part:

> "It is agreed that it shall at all times be free to his Majesty's subjects, and to the citizens of the United States, and also to the Indians dwelling on either side of the said boundary line, freely to pass and repass by land or inland navigation, into the respective territories and countries of the two parties, on the continent of America . . . and to navigate all the lakes, rivers and waters thereof, and freely to carry on trade and commerce with each other."

The Treaty of Ghent of 1814 provdes in pertinent part:

> ". . . forthwith to restore to such Tribes or Nations respectively, all the Possessions, Rights, and Privileges, which they may have enjoyed, or been entitled to in 1811, previous to such hostilities . . ."

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## STATEMENT OF THE CASE

On July 19, 1776, Petitioner, the Mic Mac Indian Nation signed the Treaty of Watertown with the Governors of Massachusetts Bay, who signed on behalf of the newly formed United States of America, exchanging recognition by the United States

and other treaty rights for military support in the American Revolution. App. at 14a; 35a.

Mary Paul is and was, at all times pertinent, a member of the Mic Mac Indian Nation and a Canadian citizen. App. at 11a.

On or about August 13, 1987 minor Wanomi Paul was born to Mary Paul and; thereafter on September 11, 1987 the Superior Court ordered the detention of the minor. App. at 5a. Prior to the filing of the petition a non-Indian couple, the Geislers, desired to adopt the minor and took control of him.

Petitioner, the Mic Mac Indian Nation, upon notice of the proceedings entered as a party to the action and alleged that the Indian Child Welfare Act, (25 U.S.C. § 1901 et. seq.) hereinafter ICWA, applied to the Mic Mac minor Wanomi Paul and that the trial court must therefore decline jurisdiction under 25 U.S.C. § 911(a). Additionally, petitioner alleged that the

Watertown, Jay and Ghent Treaties would be violated by the trial court's refusal to return the minor to the Tribe and his mother, who desired the minor released to the Tribe.

The trial court found that the ICWA applies to the petitioner, Mic Mac Indian Nation, which is located in Canada and partially in Maine. That, to deny the tribe the protection of the Act on the basis that petitioner is not on the list set forth in the Federal Register of tribes recognized to receive services from the Bureau of Indian Afairs; would be a denial of equal protection of the law as an arbitrary classification. The trial court further found that the petitioner, Mic Mac Indian Nation is recognized and has the same status as any recognized tribe based on the treaties of Watertown, Jay, and Ghent. App. at 50a-52a.

On October 3, 1988 the Court of Appeal

of the State of California, blocked the return of the minor to the tribe by issuing a temporary stay order to review the petition for Writ of Supersedeas. On November 30, 1989 the Court of Appeal issued its judgment.

The Court of Appeal reversed the Superior Court judgment, holding that the Mic Mac Indian Nation was not registered with the Secretary of the Interior and therefore could not be found to be an Indian tribe eligible for protection under the ICWA. App at 17a. The court further reasoned that, because petitioner has not been recognized as an Indian tribe by the Secretary of the Interior then the minor, Wanomie Paul, was no longer an Indian child under the ICWA and therefore the ICWA did not apply to remove jurisdiction from the State. App. at 29a.

Judge Thaxton Hanson further concluded that a foreign territory, Canada, could not

qualify as a reservation. App. 28a. The Court was silent as to the Maine Band of the Mic Mac Indian tribe. Judge Hanson then held that the minor could not be domiciled on the reservation because of the above reasoning and because the minor's mother Mary Paul had provided an insufficient statement to provide for her intent to show residence and domicile on the Mic Mac Nation reservation, because she had not used the word reservation. App. at 30a-34a.

Judge Hanson refused to address the issue of the Watertown, Jay, and Ghent Treaties other than questioning whether they were properly before the trial court and deferring to recent legislation rather than "dubiously relevant historical documents." App. 35a-36a.

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## REASONS FOR GRANTING THE WRIT

The decision by the California Court of Appeal, Second District, Division One

and refusal to review by the California Supreme Court presents a direct conflict with this Court's decision holding that the ICWA protects the rights of Indian tribes and that a tribal member need not be physically present in the tribal reservation to establish domicile. The decision also failed to give any recognition to valid treaties of the United States and made no effort to interpret the ICWA in a manner consistent with these treaties.

The decision by the Appeals Court eviscerates the intent of the 95th Congress in the ICWA to protect Indian tribes from decimation by the taking and adoption of tribal children by non-Indians.

Contrary to precedent, literal statutory language and legislative intent, the State Court of Appeal's decision with respect to recognition of Indian status, reservations, and domicile, in effect withdraws the ICWA; an important and necessary legal protection, from recognized

Indian tribes and their children.

For these reasons, as set forth more fully hereafter, a Writ of Certiorari should issue to the California Supreme Court.

1. The California Court of Appeal, Second District, Division One, Decision, Conflicts With The Indian Child Welfare Act In Holding That The Act Applies Only To Indian Tribes Listed on the Registrar of the Secretary of the Interior.

Congress did not limit or restrict the definition of "Indian Tribe" to a specific list of "federally recognized" tribes. H.R. Rep. No. 1386, 96th Cong. 2nd Sess. 2 (1978); S. Rep. No. 597, 95th Cong. 1st. Sess. 2 (1977). No reference is made to the administrative "Listing" of Indian tribes, nor any suggestion that a treaty is not in itself sufficient to create federal responsibility to an Indian tribe. In fact, the Indian Child Welfare Act states, 25 U.S.C. § 1901(2), that:

> Congress, through statutes, treaties, and the general course of dealing with Indian tribes, has assumed the

> responsibility for the protection and preservation of Indian tribes, and their resources.

Thus Congress was protecting all Indian tribes that have been recognized in some form.

The listings in the Federal Register cited by the Court of Appeal were designed to deal with the identification of "additional" tribes, rather than any redefinition of the status of tribes which previously had been recognized by treaty, Act of Congress or other means. Testimony of George Goodwin, Deputy Assistant Secretary of the Interior, pp. 17-18 is Hearing, Recognition of Certain Indian Tribes, Senate Select Committee on Indian Affairs (April 18, 1978).

Thus the decision by the Court of Appeal that the ICWA applies only to those tribes willing to go through the lengthy and arduous procedure, in order to be placed on the listing at some future time,

results in the loss of the protection of the Act to Indian tribes that are already recognized by treaty or other means. In fact the Maine band of the Mic Mac Nation has been waiting for years for a response to its petition. The Petition has not been denied, yet this Indian tribe, that has been recognized by treaty, has and will continue to lose its rights, protections and children while it awaits years for processing.

Contrary to the basic principles of statutory construction in Indian cases, the California Court of Appeal presumed that Congress intended to limit Indian rights and did not construe the treaties and legislation affecting the Mic Mac Nation in their favor. Choctaw Nation v. Oklahoma 397 U.S. 620, 631 (1970). The limitation of tribal rights should never be implied and the provisions of any tribal legislation or its legislative history must make Congress' intentions absolutely clear.

United States v. Eberhardt, 789 F.2d 1354 (9th Cir. 1986). The Court of Appeal failed to review the ICWA in this light and disregarded the statutes unambiguous language.

The Court of Appeal cited James v. U.S. Dept. of Health and Human Services (D.C. Cir. 1987) 824 F.2d 1132 (hereinafter James) as authority for its holding that placement on the "listing" by the Secretary of the Interior is the sole method for recognition of Indian tribal status. App. 27a. However the James case involved a group which was never previously recognized by a treaty or Act of Congress. James did not present a conflict between the exercise of Secretarial discretion to extend or withhold recognition, and prior exercises, by Congress, of its plenary authority over Indian affairs. Moreover, this case found the Secretary of Interior could perform the inquiry into tribal status more as a matter

of convenience, facility, and to save the court time. The James case does not apply on its facts to the question presented to the Appeals Court; rather the present case is one where tribal status has been conveyed by treaty and it is the purview of the Courts and not the Secretary of the Interior to interpret treaties.

2. Refusal Of The Court Of Appeals To Grant Tribal Status Under The ICWA To The Mic Mac Nation Violates The Watertown, Jay And Ghent Treaties.

The Treaty of Watertown of 1776 recognized the Mic Mac Nation as an Indian tribe enjoying a special relationship with the United States. App. at 49a. Moreover the Articles I, II, and III of the Jay Treaty of 1794 (8 Stat. 116 TD 105; I Molloy 590; Office of Legal Advisor, Department of State Treaties in Force, page 23 (1964) and Article IX of the Ghent Treaty 1814 (8 Stat. 218) expressly protect Indian rights of free passage over the then newly established borders of Canada and the

United States and to enjoy such rights unmolested. This provision is still regarded as being in force, United States Department of State, Treaties in Force (1988). Absent explicit statutory language, the courts have been reluctant to find implied repeal of treaty rights. Washington v. Washington State Comm., (1979) 417 U.S. 658, 690. And, "The Department of the Interior cannot under any circumstance abrogate an Indian treaty directly or indirectly. Only Congress can abrogate a treaty, and only by making absolutely clear its intention to do so." United States v. Washington, 641 F.2d 1368, 1371 (9th Cir. 1981). In the present case the Court of Appeal did not review the treaties at all simply because they were too old or historical in nature.

Additionally the United States Supreme Court in discussing the right to travel issue has put forth criterion of review; as

to whether, the legislation would create a hesitation to travel or serve as a penalty. Memorial Hospital v. Maricopa County 415 U.S. 275 (1974). The present case with the loss of a child has resulted in a chilling influence and penalty for the Mic Mac Nation. Once again, the Court of Appeal did not address any issues brought about by the three treaties; especially whether they convey the right to be treated as a tribe under the ICWA.

3. The Decision By The California Court of Appeal District Two, Division One Conflicts With This Court's Decision Holding That Domicile For Purposes of the ICWA Does Not Require A Physical Presence On The Indian Reserve.

The Court of Appeal, cited Mississippi Band of Choctaw Indians v. Holyfield (1989) __ U.S. ___, 109 S.Ct. 1597, then inexplicably seemed to imply that the present case does not involve the maintenance of an Indian family in an Indian home. App. at 30a-31a. And the

Court of Appeal argued that no evidence was contained in the record of the case that a reservation existed or that the minor's mother, Mary Paul established domicile or residence on such reservation. App. 32a-34a. And the Court points to Mary's declaration of her intent to reside and domicile with the Mic Mac Nation as lacking presumably because it also refers to Canada and does not use the specific word reservation. App. 33a. Finally the Court of Appeal points to trial courts finding and asserts there was no finding of domicile on a reservation. App. 21.

The Court of Appeal did not gather any evidence and a review of the trial court's judgment shows specifically that the court found:

> "The domicile and permanent residence of Mary Veronica Paul is in the Membertou Indian Nation, Sydney, Nova Scotia, Canada and the Mic Mac tribes in Canada and the State of Maine are branches of the Membertou Tribe."

See Finding No. 5, App. 51a-52a. Clearly

the trial court found residence and domicile within the Mic Mac Nation which is one and the same with the Membertou Tribe. And if the residence and domicile were within boundaries of the Mic Mac Nation then they were within the reservation of the Mic Mac Nation. The term reservation simply referring to the geographical boundaries of an Indian tribe. Moreover the trial court must have intended this finding to refer to the concept of residence and domicile within the reservation as required by the ICWA because it also ordered that ". . . that the said tribe is protected under the ICWA. . ." and ". . . the Mic Mac tribe has duly complied with all requirements for the exercise of jurisdiction under the ICWA." See Order. App. 54a.

Despite this the Court of Appeal held to its own notion that the word reservation must be specifically used by Mary Paul or

the trial court as if it was some magic password into the protection of the Act. The Court of Appeal could have remanded for further evidentiary hearings or asked for clarification by the trial court or even further specific argument by the parties. Instead the Court of Appeal referred to a second declaration submitted by the second attorney for the mother, Mary Paul, stating that she changed her position and that Los Angeles was her place of residence at the time of birth. However this second declaration was signed in Canada, almost one year after the trial court's judgment and two years after the events in question. The declaration was allegedly signed by the mother, Mary Paul, whom the County of Los Angeles Department of Children's Services reports, assessed, as having a long history of mental problems, being brain damaged, having slow though processes and ceasing to talk about a topic in mid-

sentence and having to be reminded of the topic. App. 7a-8a. A subsequent report on February 24, 1988 indicated information from the petitioner that Mary Paul had been diagnosed as a schizophrenic. App. 10a. Thus the Court of Appeal's reliance on a declaration by a declarant who could not remember a topic past mid-sentence about facts that occurred almost two years before her declaration does not seem justified, especially to overturn specific findings of a trial court. And, "Tribal jurisdiction under § 1911(a) was not meant to be defeated by the actions of individual members of the tribe, for Congress was concerned not solely about the interests of Indian children and families, but also of the tribes themselves." Mississippi Choctow Indian Band v. Holyfield, supra, at p. 18.

As to the geographical argument by the Court of Appeal, the Mic Mac Nation

has settlements in both Canada and the United States and thus there has been no evidence supporting the underlying assumption, by the Court of Appeal, that the Mic Mac Nation lands are solely on foreign territory. Nevertheless Petitioner contends that by the language of the act itself, since the Mic Mac Nation has been recognized by the Treaty of Watertown and is protected by the Jay and Ghent treaties, the question of geographical location of the reservation is mute.

4. The California Court of Appeal Decision Withdraws From Indian Tribes An Essential Legal Protection Against The Decimation Of Indian Tribes.

Petitioner, Mic Mac Nation submits that at a time when the market in the United States for newborn babies is so high and the supply so limited, then the danger for abuse, whether for profit or otherwise is great.

Even in 1977 the Congressional

hearings on the act found that Indian tribes were being decimated by having Indian children taken from tribes. See Holyfield, supra, at p.3. The problem persists today and the protection intended by the Act is being eroded by state courts, who still see Indian tribes as foreign and uncivilized. "Indeed the Congressional findings that are a part of the statute demonstrates that Congress perceived the States and their Courts as partly responsible for the problem it intended to correct." Holyfield, supra, at p. 14. This is especially true in the present case where the Court of Appeal has completely reinterpreted the Act and case law into non-existence. The Court of Appeal went so far as to hold that without the use of the word "reservation" there was no domicile and without a reservation that conformed to the state courts own definition that no Indian tribe existed

and thus no Indian minor for the Act to be applied upon. This is an indefensible manner in which to treat an Indian Nation that within fifteen (15) days of the United States declaration of independence came to our aid, signed the first treaty with this country and has since complied with that treaty by providing military support in the form of Mic Mac Warriors.

The fact that this is a California case provides greater impetus for other states to follow its lead in eviscerating the ICWA by simply not following the clear language of the Act and defining terms in the Act so that the Act doesn't apply. Petitioner, the Mic Mac Nation request that this Court not allow such an erosion of a law so vital to the continued existence of Indian tribes, clearly an endangered species.

## CONCLUSION

For the foregoing reasons, petitioner respectfully prays that a Writ of Certiorari issue to review the decision by the California Court of Appeal, Second District, Division One.

DATED: May 10, 1990

Respectfully Submitted,

Jaime M. Cervantes
Counsel for
Petitioner

ORDER DENYING REVIEW

AFTER JUDGMENT BY THE COURT OF APPEAL

Second Appellate District,

Division One, No. B036785

S013614

IN THE SUPREME COURT OF THE

STATE OF CALIFORNIA

IN BANK

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In Re WANOMI P., A Person Coming Under the Juvenile Court Law

DONALD JAMES GIESLER Et Al., Appellants

v.

MARY V. P. Et Al., Respondents

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Petition for review DENIED.

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Chief Justice

IN THE COURT OF APPEAL

OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

| | |
|---|---|
| In re WANOMI P., | ) No. B036785 |
| | ) (Super.Ct.No. |
| A Person Coming Under the Juvenile Court Law. | ) J 975887) |
| DONALD JAMES GIESLER et al., | ) |
| Petitioners and Appellants, | ) |
| v. | ) |
| MARY V. P. et al., | ) |
| Respondents. | ) |

APPEAL from a judgment of the Superior Court of Los Angeles County. Ernest O. Williams, Judge. Reversed and remanded with directions.

Randall B. Hicks, for Petitioners and Appellants Donald and Deborah Giesler.

De Witt W. Clinton, County Counsel, and Charles W. Nickell, Contract County Counsel, for Petitioner and Appellant

Department of Children's Services of Los Angeles County.

Jill M. Bojarski, under appointment by the Court of Appeal, for Respondent Mary V. P.

Jaime M. Cervantes, for Respondent Mic Mac Nation.

## INTRODUCTION

This case involves the custody of a minor born in California to a mother who is a member of a Canadian Indian tribe. It calls upon us to determine whether the Indian Child Welfare Act (25 U.S.C., § 1901 et seq.) requires the California courts to transfer jurisdiction over the minor to the Canadian Indian tribe.

## FACTS

On September 10, 1987, the Los Angeles County Department of Children's Services ("the petitioner") filed a Welfare and Institutions Code section 300 petition alleging that a minor, Wanomi P. ("the

minor"), born August 13, 1987, came within the provisions of section 300, paragraph 1, subdivision (a) in that the minor had no parent or guardian capable of and actually exercising proper, effective parental care and control and needed such care and control. The petition further alleged that the minor had lived in the hospital since his birth three weeks earlier; the minor's mother, whose true name is Mary Veronica P. ("Mary"), was intellectually impaired, making her unable to care for the minor properly; the minor had unique medical problems requiring a high level of parenting skills, including colostomy care; the minor's mother was transient and had no permanent residence in which to care for the minor; and the identity and whereabouts of the minor's father and his interest and ability to care for the minor remained unknown.

The petition stated that the child

might be an Indian child as defined by the Indian Child Welfare Act (the "ICWA"). The Mic Mac Nation ("Mic Mac Nation") of Nova Scotia, Canada, eventually appeared and sought custody of and jurisdiction over the minor.

On September 11, 1987, the trial court found that a prima facie case for detaining the minor and showing that the minor was a person described by section 300 was established. It further found that a substantial danger to the minor's physical/ emotional health existed. The trial court ordered detention of the minor.

The petitioner prepared an assessment. Mary was born March 14, 1953, in Sidney, Nova Scotia, Canada. At age two years, Mary's mother physically abused her, causing broken bones and a skull fracture that brought her near death and required hospitalization for several months. At age nine, Mary was placed in an orphanage

because her father had injured his back and could not provide for the children. The oldest child, she has three brothers and one sister. The parents are now deceased.

Mary dropped out of the seventh grade but received her G.E.D. in Boston. She lived in a foster home from age 9 to 17 or 18. She was married to James Andross but they divorced after five years, with no children. She returned to Canada, worked waiting and bussing tables, and had a daughter, Monica P., on April 2, 1979. She had another child, but would not reveal its name or birth date to petitioner. Mary claimed both children were taken from her because of her history of having been abused.

The assessment stated that Mary is a member of the Mic Mac tribe in Sidney, Nova Scotia, Canada, tribal band number 180. She claimed she had come to the United States alone about a year earlier, was raped

twice, and did not know the identity of the minor's father.

Shortly after birth, the minor was found to have a hole in his intestine. Minor surgery, involving a colostomy, corrected the problem. The colostomy was anticipated to be temporary, and the minor seemed well in other respects.

The assessment stated reasons for its recommendation as follows. The minor was before the court because it appeared Mary was brain damaged and incapable of caring for an infant with serious medical problems. Since arriving in California alone about a year earlier, Mary had no job or shelter before staying at the Bible Tabernacle. The abuse she sustained as a child, especially the skull fracture, may have produced the brain damage that the report stated was "apparent to all who deal with the mother," citing slow thought processes and ceasing to talk about a topic in

mid-sentence and having to be reminded of the topic. Although the Bible Tabernacle is "notoriously liberal regarding mothers and their children," the shelter did not want the minor released to Mary because they did not feel she could care for a baby.

Mary withheld information about her two or three other children residing in Massachusetts or Nova Scotia. Although claiming to be a member of the Mic Mac tribe, tribal band No. 180, Mary did not want the tribe involved. The petitioner had contacted Jimmy Sam, of the Bureau of Indian Affairs, to search for the tribe and verify the mother's membership in it.

Petitioner concluded that the mother was brain damaged and could not care for a young child with physical problems. Petitioner felt that the fact that Mary's two other children may have been taken from her did not augur well for her ability to

care for the minor.

Mary contacted the Christian Adoption and Family Services and chose Donald and Deborah Giesler ("the Geislers") as adoptive parents for the minor. The Geislers met Mary several times, saw and fed the baby in the hospital, but later learned that Mary had changed her mind and did not wish to adopt. The Geislers, however, desired to adopt the minor, and hoped the minor could stay with them pending further orders of the court. The Geislers applied for a foster care license.

In a report dated November 19, 1987, the petitioner stated that Mary's whereabouts were unknown. She had left the Bible Tabernacle Shelter on November 6, 1987. No confirmation of her membership in the Mic Mac tribe had yet been made. She had not visited the minor, who was still with the Geislers, but did send a Halloween card and a pair of socks.

Petitioner's report dated December 16,

1987, added no new information. In a February 24, 1988, report, petitioner stated that the Mic Mac tribe had been notified of the hearing date. The tribe desired to have the minor returned to Nova Scotia and placed with a Mic Mac family. A letter from the Mic Mac tribe stated that Mary had a long history of mental problems, and had been diagnosed as a schizophrenic.

The minor, who had lived with the Geislers for several months, had bonded with them. The Geislers wished to keep and eventually adopt the minor. Two of Mary's children, Monica and William, are in foster homes and not with tribal families. Mary had appeared at Hollywood Presbyterian twice, appearing to someone on the staff to have psychological problems. An intern at USC Alternatives confirmed that Mary had been there for a few days, allegedly pregnant with a non-viable fetus. On January 12, 1988,

Mary, angered, had thrown a cup of coffee against a wall, and it was decided not to allow her to continue to live there. USC Alternatives arranged for Mary's sister, in Nova Scotia, to send her money to return. Somehow the check got into Mary's hands. She cashed the check and left rather than using it to buy a bus ticket, and remained in Southern California.

Mary had visited with the minor once, on January 10, 1988, when the Geislers took him to USC Alternatives.

The trial court admitted into evidence a declaration of Mary Veronica P. dated June 10, 1988, declaring under penalty of perjury that she was a registered member of the Membertou Indian Nation of Sydney, Nova Scotia, and a Canadian citizen and that it was her intent to return to Canada, her "permanent residence and domicile," and reside with the Mic Mac nation.

On June 23, 1988, the trial court denied the Geislers' motion for standing

to appear in the case.

The trial court filed a statement of decision and judgment on July 14, 1988. Its findings of fact stated that Mary was a Canadian citizen, a registered Indian, and a member of the Membertou Indian Band of the Mic Mac Nation in Nova Scotia, Canada within the meaning of the Indian Act, chapter 27, Statutes of Canada (1985). The minor was entitled to be registered as an Indian in Canada in accordance with the Indian Act. Mary desired the trial court to decline jurisdiction and release the minor to the Mic Mac Nation for placement with a native family in Canada. Mary's permanent residence is in the Membertou Indian Nation, Sydney, Nova Scotia, Canada; the Mic Mac tribes in Canada are branches of the Membertou tribe. Mary had been physically present in the Los Angeles area for approximately one and one-half years.

The trial court further found that the

Treaty of Watertown, the Treaty of Amity, Commerce and Navigation (the Jay Treaty of 1794) and the Treaty of Ghent between the United States and Canada regulate Indian relations between the two nations. The United States recognized the Mic Mac Indian Nation from Maine in the Watertown Treaty of 1776, still in force. The Mic Mac Nation recognized the minor as a member of their nation and requested the minor's release to the nation. The commerce clause of the United States Constitution grants Congress plenary power over Indian Affairs and forms the basis for the ICWA.

The trial court declared it United States policy to foster the unique values of Indian culture. It further stated that Indian tribes are sovereigns predating the United States Constitution and American courts recognize a trust relationship between the United States and the Indian nations. The Legislature has enacted

regulations to ensure protection of the special status of Indian nations. The Mic Mac Nation constitutes an Indian tribe in both a racial and cultural sense since at least 1776, has had a long affiliation with the United States, and provided military support during the American revolution. The Mic Mac tribe from Maine and the Mic Mac tribe from Nova Scotia, however, are not registered with the Secretary of the Interior.

The trial court ordered that the minor be returned to the Mic Mac in Canada; stated that the ICWA protects the Mic Mac tribe; and declared that the trial court did not have further jurisdiction since the Mic Mac tribe had complied with all requirements for exercise of jurisdiction under the ICWA. The trial court granted a 30-day stay to permit co-counsel to seek a writ of review, with the minor to be returned to the Indian tribe unless the

Court of Appeal issued a stay.

The Court of Appeal denied petitioner's writ of mandate, but granted a petition for writ of supersedeas and stayed the order sending the minor to Canada.

As part of a motion for emand filed July 10, 1989, which was denied, Mary, through her attorney, filed a declaration stating that she had reconsidered her position before the trial court and concluded that it would be severely detrimental to the minor, both physically and emotionally, if he were placed under the tribal court's jurisdiction. She declared that she had been informed that if the minor were returned to Canada, he would be placed in a foster home rather than being returned to her. She declared that since the minor had spent virtually all of his life with the Geislers, she believed it would be emotionally damaging to him to be removed from the only home

he knows and placed with strangers. Having herself been raised in foster homes and suffered both physically and emotionally as a result, Mary declared that she did not want that for her child and believed him to be better off with the Geislers, whom he knows and loves. She further declared that the minor was born in Los Angeles at a time when she considered it to be her place of residence, and that the minor had never lived on the Mic Mac reservation.

The petitioner and the Geislers jointly filed a notice of appeal on August 11, 1988. The Geislers have submitted an opening and a reply brief; Mary V. P. and the Mic Mac Nation, separately represented by counsel, have submitted respondents' briefs. On November 10, 1989, the Geislers filed a "Medical Update Regarding the Minor" with this court in which the minor's physician stated that he believed it would be in the minor's best interest, medically

and psychologically, to remain in the Geislers' care.

ISSUES

On appeal the Geislers claim that the trial court:

1. Erroneously found that the Indian Child Welfare Act applied to the Mic Mac Indian tribe of Nova Scotia, Canada, and that it had no subject matter jurisdiction over the minor; and that

2. Erroneously found that it had no jurisdiction over the minor; and

3. Erroneously found that it lacked jurisdiction to hear their motion for standing.

DISCUSSION

The Geislers on appeal claim that the trial court erroneously found that the ICWA applied to the Mic Mac Indian tribe of Nova Scotia, Canada, and erroneously found that the court lacked subject matter jurisdiction.

The trial court relied upon the statement of exclusive jurisdiction in 25 U.S.C. section 1911, subdivision (a): "An Indian tribe shall have jurisdiction exclusive as to any State over any child custody proceeding involving an Indian child who resides or is domiciled within the reservation of such tribe, except where such jurisdiction is otherwise vested in the State by existing Federal law. Where an Indian child is a ward of a tribal court, the Indian tribe shall retain exclusive jurisdiction, notwithstanding the residence or domicile of the child." Noting that the statute distinguishes conceptually between "domicile" and "residence" by using those terms in the disjunctive, the trial court asserted that an Indian child may be located physically off the reservation but still be domiciled within, citing Matter of Appeal in Pima County (Ariz. App. 1981) 635 P.2d 187.

The trial court also stated that in 1776 the Mic Mac Nation concluded a treaty with the commonwealth of Massachusetts. Although an unpublished treaty, the trial court asserted that it remains a legally recognized document, one of the first international treaties in American history, which Massachusetts renewed and reenacted in 1987. The trial court stated, "The Mic Macs have a special relationship with the United States as they were the first Indian nation to be recognized by the United States." The trial court noted that a small Mic Mac community in Maine "is currently proceeding with a petition for federal recognition with the Secretary of the Interior. Should this recognition status be granted all Mic Macs would be covered under the eligibility requirements of the ICWA."

The trial court acknowledged that the list of Indian tribes officially recognized

as entitled to services set forth in the Federal Register does not include the Mic Mac Nation as a recognized tribe to receive services from the Bureau of Indian Affairs. Despite this omission, the trial court reasoned as follows. "This Court finds that the exclusion of the Mic Mac Nation was not intended to be all inclusive for two reasons: First a denial of any Bona Fide Tribe from the special status of Indians would be a denial of equal protection of the law as an arbitrary classification; secondly, the Mic Mac Nation, is a Tribe of Indians partially located in the State of Maine is a part of the same Mic Mac Nation also located in Canada. The status of the said Tribe, by virtue of the Treaty of the Watertown Treaty, Wednesday, July 17, 1776, and having been recognized by Congress as recent as June 22, 1987 (Exhibit D, brief submitted by Betty G. Barrington). In addition thereto the Treaty of Ghent,

(Exhibit B, same brief) and the Treaty of Amity, Commerce and Navigation (Exhibit A, same brief) clearly grants to the Mic Mac Tribe of Canada the same status as the Indian Tribes in the USA and said tribe is entitled to the same protective umbrella that is recognized by the U.S. Government." [Sic.]

The jurisdictional ruling in a Welfare and Institutions Code section 300 proceeding is subject to our review to determine whether substantial evidence supports the lower court's conclusions sitting as a trier of fact. (In re Katrina C. (1988) 201 Cal.App.3d 540, 547.) The case at bench, however, also requires our scrutiny of relevant statutes, on whose construction we may rule as a matter of law.

25 U.S.C. section 1911, subdivision (a) gives an Indian tribe exclusive jurisdiction as to any state in:

a. a child custody proceeding

b. involving an Indian child

c. residing or domiciled

d. within the reservation of such Indian tribe.

CHILD CUSTODY PROCEEDING: A Welfare and Institutions Code section 300 proceeding is a "child custody proceeding," since it may result in foster care placement, termination of parental rights, or preadoptive or adoptive placement as enumerated and defined in 25 U.S.C. section 1903, subdivision (1).

INVOLVING AN INDIAN CHILD: 25 U.S.C. section 1903, subdivision (4) defines an "Indian child" as "any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe."

25 U.S.C. section 1903, subdivision

(8), defines an "Indian tribe" to mean "any Indian tribe, band, nation, or other organized group or community of Indians recognized as eligible for the services provided to Indians by the Secretary because of their status as Indians, including any Alaska Native village as defined in section 1602(c) of Title 43."

RESIDENCE AND DOMICILE: 25 U.S.C. section 1903 does not define residence and domicile, but Mississippi Band of Choctaw Indians v. Holyfield (1989) _____ U.S. _____, 109 S.Ct. 1597, 1608, adjudicating this aspect of the ICWA, states generally that adults establish domicile by "physical presence in a place in connection with a certain state of mind concerning one's intent to remain there."

WITHIN THE RESERVATION OF SUCH INDIAN TRIBE: 25 U.S.C. section 1903 (10) defines "reservation" to mean "Indian country as defined in section 1151 of Title

18 and any lands, not covered under such section, title to which is either held by the United States in trust for the benefit of any Indian tribe or individual or held by any Indian tribe or individual subject to a restriction by the United States against alienation."

Given these statutory rules and definitions, the trial court erroneously found that the Indian Child Welfare Act deprived it of jurisdiction in the case at bench.

First, as the trial court found, neither the Mic Mac tribe of Maine nor the Mic Mac tribe of Nova Scotia are registered with the Secretary of the Interior or recognized by the Secretary of the Interior or recognized by the Secretary as eligible for services provided to Indians. 51 C.F.R. 131, Thursday, July 10, 1986, lists "Indian Tribal Entities Recognized and Eligible to Receive Services from the

United States Bureau of Indian Affairs." Neither Mic Mac tribe appears on that list, which was before the trial court. 25 CFR section 83.6, subdivision (b) requires the Secretary of the Interior to publish in the Federal Register a list of all Indian tribes which are recognized and receiving services from the Bureau of Indian Affairs, and to update and publish that list annually. The latest list, published December 29, 1988, does not include the Mic Mac Nation. (53 F.R. 52829.)

The Department of the Interior must acknowledge tribal existence as a prerequisite to the protection, services, and benefits from the federal government available to Indian tribes. "Such acknowledgment shall also mean that the tribe is entitled to the immunities and privileges available to other federally acknowledged Indian tribes by virtue of their status as Indian tribes as well as

the responsibilities and obligations of such tribes." (25 C.F.R. 83.2.)

25 C.F.R. 83 sets forth "Procedures for Establishing that an American Indian Group Exists as an Indian Tribe." Section 83.1, subdivision (f), states that "Indian tribe" means "any Indian group within the continental United States that the Secretary of Interior acknowledges to be an Indian tribe." As described in 25 C.F.R. 83.3, subdivision (a), part 83 "is intended to cover only those American Indian groups indigenous to the continental United States which are ethnically and culturally identifiable, but which are not currently acknowledged as Indian tribes by the Department." Section 83.4, entitled "Who may file," states that "[a]ny Indian group in the continental United States" believing it should be acknowledged as a tribe and satisfying statutory criteria can petition the Secretary. (Emphases

added.)

In the case at bench no authority has been cited that would make possible the conclusion that the ICWA applied to a Canadian or other foreign Indian tribe.

25 U.S.C. section 1903 (8) refers to an "Indian tribe" as "any Indian tribe, band, nation, or other organized group or community of Indians recognized as eligible for the services provided to Indians by the Secretary because of their status as Indians. . . ." The Mic Mac Nation argues that this "recognition" is to be contrasted with the "acknowledgement" of tribal status referred to in 25 C.F.R. 83. James v. U.S. Dept. of Health and Human Services (D.C. Cir. 1987) 824 F.2d 1132, 1136-1137, however, rejected this distinction, holding that the executive branch of the federal government, not the judicial branch, makes initial determinations of whether groups have been or will be accorded federal

recognition as American Indian tribes. Contrary to the Mic Mac Nation's argument on appeal, the Secreatary of the Interior has the power to create reasonable classifications and eligibility requirements that are rational, proper, duly published, consistent with governing legislation, and consistently followed by the administrative agency. (Morton v. Ruiz (1974) 415 U.S. 199, 230-236.)

Secondly, the trial court made no finding that the Mic Mac tribe of Nova Scotia, Canada, lives on a "reservation," and in any case foreign territory could not qualify as a "reservation" as defined by 25 U.S.C. section 1903, subdivision (10). It is not "Indian country" defined by 18 U.S.C. section 1151 and subject to United States law. "Except as otherwise provided in sections 1154 and 1156 of this title, the term 'Indian country,' as used in this chapter, means (a) all land within the limits of any Indian reservation under

the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same." (Emphasis added.)

Thirdly, because the Mic Mac tribe has not been recognized as an Indian tribe, the minor is not an "Indian child" as defined by the Indian Child Welfare Act (25 U.S.C. § 1903 (4).) Because the case at bench does not involve an Indian child, neither section 1911, subdivision (a), nor section 1911, subdivision (b) (applying to an "Indian child" not residing or domiciled on a reservation of the Indian child's

tribe) removes jurisdiction from the State of California.

Fourth, the minor was neither resident of nor domiciled in an Indian reservation. Matter of Adoption of Baby Boy L. (Kan. 1982) 643 P.2d 168, 175, stated that "the overriding concern of Congress and the proponents of the Act was the maintenance of the family and tribal relationships existing in Indian homes and to set minimum standards for the removal of Indian children from their existing Indian environment." The case at bench does not present that situation. The minor's father remains unknown. Mary, the mother, had not been domiciled nor had resided on an Indian reservation during pregnancy, at the time the minor was born, or as late as June 10, 1988, nearly ten months after the minor's birth, at which time in a declaration sworn in California she declared her intent to return to Canada.

Regulating the unwarranted removal of children from Indian families by nontribal public and private agencies was among the objectives of the ICWA as stated in the legislative findings. (25 U.S.C.A. 1901 (4).) No evidence suggested the existence of an "Indian home" existed from which the minor was "removed." (See Claymore v. Serr (S.D. 1987) 405 N.W.2d 650: For a tribal court to have exclusive jurisdiction over a child custody proceeding involving Indian child, under the ICWA the child must be member of an existing Indian family.)

"In effect, Congress used the domicile of the child as a basis for distinguishing between those who maintain close ties with the tribe and, therefore, should be subject to its exclusive control and those who are sufficiently removed from the tribe and its ways to justify giving jurisdiction over them to non-Indian courts in certain circumstances." (Matter

of Adoption of Halloway (Utah 1986) 732 P.2d 962, 968.)

Noting that the ICWA does not define "domicile," the United States Supreme Court has reviewed the concepts of residence and domicile. The terms are not necessarily synonymous; a person can reside in one place while domiciled in another. For adults physical presence in a place plus an intent to remain establishes domicile. Because minors usually lack the legal capacity to form the intent required, their parents determine their domicile. An illegitimate child has traditionally taken its mother's domicile. (Mississippi Band of Choctaw Indians v. Holyfield, supra, 109 S.Ct. 1597, 1608.)

In Holyfield, the court held that where both the mother and father of twin infants were enrolled members of an Indian tribe, and the parents were residents and domiciliaries of the tribe's reservation

in Neshoba County, Mississippi, the twins were at birth also domiciled on the reservation, even though they had been born outside, and had never visited, the reservation. Holyfield characterized the ICWA as placing the decision about determining custody of Indian children domiciled on the reservation in the hands of the tribal court. (Id. at pp. 1608-1611.)

In Holyfield, both parents were "reservation-domiciled tribal members." (Id. at p. 1610.) In the case at bench, the record contains no evidence that a reservation as defined by the ICWA exists for the Mic Mac or Membertou tribes, nor does it contain evidence that Mary established domicile or residence on such a reservation. Her June 10, 1988, declaration states only that she is a Canadian citizen, that she is a member of the Membertou Indian Nation of Sydney,

Nova Scotia, and that "[i]t is my intent to return to Canada, which is my permanent residence and domicile, and reside with the Mic Mac Indian Nation."

The trial court's findings do not include a finding that Mary established domicile on a reservation. Only where an Indian child resides or is domiciled within the reservation of an Indian tribe (as defined by § 1903) does section 1911, subdivision (a) of the ICWA establish exclusive jurisdiction in tribal courts. (Mississippi Band of Choctaw Indians v. Holyfield, supra, 109 S.Ct. 1597, 1601; see also B.R.T. v. Executive Director of S.S. Bd. N.D. (N.D. 1986) 391 N.W.2d 594, 598-599: state court properly exercised jurisdiction in custody proceeding on undisputed evidence that mother and child resided and were domiciled off the reservation; In re Interest of Bird Head (Neb. 1983) 331 N.W.2d 785, 790: evidence

that minor resided off reservation supported denial of transfer of proceedings to Indian tribe; and Matter of Adoption of T.R.M. (Ind. 1988) 525 N.E.2d 298, 306: mother and child not domiciled on the reservation precluded tribal exercise of exclusive jurisdiction.)

As to the claim that treaties may constitute recognition of tribal status, the trial court relied upon three such treaties. The statement of decision and judgment describes the Treaty of Watertown 1776 to "confer special status on the Mic Mac Nation." Because that treaty remains "unpublished," it was not properly before either the trial court or this court. Moreover, its signatories were apparently the Mic Mac Nation and the Commonwealth of Massachusetts. Absent some authority to the contrary, the latter party would not have bound the United States federal government before it existed. The parties to the Treaty of Amity, Commerce and

Navigation (1794) and the Treaty of Ghent (1814) were the United States and the United Kingdom. It is likewise questionable whether either treaty was properly part of the record before the trial court. In any case, neither treaty mentions the Mic Mac Indian tribe or supports the trial court's erroneous conclusion that such treaties "regulate Indian relations between the United States and Canada" in any way affecting the case at bench. The connection between these eighteenth and early nineteenth century treaties and the issues raised by the case at bench remains tenuous at best. As against dubiously relevant historical documents, we must defer to recent legislation that specifically addresses issues presented by this case.

The Mic Mac Nation argues that it is a sovereign nation, with its own government, and that these dealings by treaty constitute recognition of the Mic Mac Nation

by the United States Federal Government. The ICWA accords rights, procedures, and responsibilities only to recognized Indian tribes within the 48 continental United States. The concept of sovereignty does not convert a Canadian Indian tribe to one coming within the scope of United States law. The ICWA does not employ sovereignty to determine what entities fall within its scope. Indian tribal sovereignty as defined by United States law, in any case depends on and is subordinate to the United States Federal Government. (Washington v. Confederated Tribes (1980) 447 U.S. 134, 154.)

Welfare and Institutions Code section 300 sets forth the specific circumstances relating to the juvenile court's acquisition of jurisdiction over a minor child in a dependency proceeding. Even more fundamentally, the California courts have jurisdiction over the minor in the

case at bench because he was (1) born in California, (2) is an American citizen, and (3) has resided in California his entire life. Presence, residence, and citizenship all confer jurisdiction over an individual upon a state court. (Rest.2d Conflict of Laws, § 27.) Any one of these bases supports the juvenile court's jurisdiction over this minor.

The Geislers also claim error in the trial court's finding that it had no jurisdiction to hear their motion for standing. We agree with the Geislers. In re B.G. (1974) 11 Cal.3d 679, 692-693 holds that de facto parents, i.e., those assuming the role of parent, raising the child in their home, and thereby acquiring an interest in the child's care, companionship, custody, and management should be permitted to appear as parties in juvenile court proceedings.[1]

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1 Although we have determined that the case at bench does not fall under the ICWA, even if it were to do so the Act's provisions appear to support the minor's placement with the Gieslers. The facts and circumstances of this case would appear to support a determination by the lower court that continued custody of the minor by the parent is likely to result in serious emotional or physical damage to the child. (25 U.S.C. 1912, subds. (e) and (f).) Even the mother's initial consent to foster care placement or to termination of parental rights, followed by her withdrawal of that consent, and her subsequent revocation of that withdrawal of consent coupled with her declaration that she believes the minor would be better off emotionally and physically with the Gieslers, with whom he has lived since within a few days of

his birth, would appear to support the conclusion that the mother has voluntarily terminated her parental rights under 25 U.S.C. section 1913. Our conclusion that the ICWA does not govern the case at bench, however, means that its provisions do not form the basis for the trial court's future determinations of these issues.

We conclude that the trial court erroneously ruled that the ICWA deprived the California courts of jurisdiction in the case at bench. This case does not meet the requirements for ICWA jurisdiction, and we reverse the trial court's ruling and remand the case with directions for the trial court to accept jurisdiction, and to proceed, under California law.

DISPOSITION

We reverse and remand the case with directions for the trial court to accept jurisdiction, and to proceed, under California law.

CERTIFIED FOR PUBLICATION.

HANSON (Thaxton), J.

We concur:

SPENCER, P.J.

DEVICH, J.

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

| | |
|---|---|
| In The Matter of | ) Case No. J 975887 |
| | ) |
| WHAMONIE PAUL, | ) STATEMENT OF DECISION |
| | ) AND JUDGMENT |
| A Minor. | ) |
| | ) |

The above-entitled cause, having come on for hearing June 8, 1988, in Department 239, the HONORABLE ERNEST O. WILLIAMS, Judge Presiding, mother appearing through her counsel, BETTY G. BARRINGTON; minor appearing through her counsel, KATHERINE ANDERSON; the Mic Mac Indian Nation appearing through its counsel, JAIME M. CERVANTES; the Department of Children's Services appearing through its counsel, CHARLES NICKELL, Deputy County Counsel; and DONALD JAMES GIESLER and DEBORAH ARLENE GIESLER, caretakers appearing through their counsel, RANDALL B. HICKS.

The primary issue involved in the within case is whether a mother, a Canadian citizen of Indian heritage and her Indian child born

while residing in Los Angeles come within the protection of the Indian Child Welfare Act. The mother is a member of the Mic Mac Tribe in Canada has since returned to the tribe in Canada. The child under the control of the Department of Children's Services is now the center of this dispute. The Mic Mac Tribe in Canada is claiming its prior right to the custody of the minor child and desires to have the child returned to the Indian Tribe in Canada; the Department of Children's Services desires that the child remain in California under Foster Care. The foster parents desire to adopt the said minor. This Department of Children's Services' action is still in the adjudication stage because the Dependency Court has not yet exercised any jurisdiction over the minor. In order to fully understand the Court's decision it is essential that a brief history and summary of the Indian Child Welfare Act hereinafter referred to as ICWA be reviewed. The Court

wants to take this opportunity to congratulate all counsel for doing an excellent task of briefing the subject matter involved herein.

## I.

## POLICY & LEGISLATIVE HISTORY OF I.C.W.A.

Indian Tribes are sovereigns predating the U.S. Constitution, and tribal sovereignty is limited only to the extent expressly authorized by Congress. United States v. Wheeler, 435 U.S. 313, 323, 98 S.Ct. 1079, 55 L.Ed.2d 303 (1978). Congress has plenary authority over Indian affairs. Delaware Tribal Business Comm. v. Weeks, 430 U.S. 73, 97 S.Ct. 911, 51 L.Ed. 2d 173 (1977), both on and off the reservation. United States v. Nice, 241 U.S. 591, 36 S.Ct. 696, 60 L.Ed.2d 1192 (1916). State law generally applies to off-reservation Indian activities in the absence of federal law to the contrary and

the ICWA is such express federal law. Mescalero Apache Tribe v. Jones, 411 U.S. 145, 93 S.Ct. 1267, 36 L.Ed.2d 114 (1973). The ICWA is a compromise between traditional plenary federal authority over child custody matters. Federal statutes affecting Indians are interpreted according to judicially developed canons of construction and consist of several principles: (1) The United States has a guardian-ward relationship with Indian tribes under its protection and statutes affecting Indians must be interpreted to fulfill this unique federal obligation. The Cherokee Nation v. The State of Georgia, 30 U.S. 1, 8 L.Ed. 25 (1931); (2) Statutes passed for the benefit of Indian tribes are to be liberally construed. Bryan v. Itasca County, 426 U.S. 373, 392, 96 S.Ct. 2102, 48 L.Ed.2d 710 (1976); and (3) Ambiguous expressions in statutes affecting Indians must be resolved in a manner that benefits Indians.

Alaska Pacific Fisheries v. United States, 248 U.S. 78, 39 S.Ct. 40, 63 L.Ed. 138 (1919).

25 U.S.C. Sec. 1901(4) states:

> "(4) that an alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies and that an alarmingly high percentage of such children are placed in non-Indian foster and adoptive homes and institutions..."

Thus, Congress, through the ICWA, has implemented minimum federal standards to be met by state courts when dealing with Indian families.

Jurisdiction under the ICWA is based on domicile and residence rather than simple physical presence. State Court Guidelines for Implementing ICWA, Federal Register, Vol. 44, No. 228. The first question that must be answered when an Indian child is brought before a state court in a custody proceeding is whether

the court has jurisdiction over the child and if so, whether jurisdiction should be transferred to the appropriate tribal court.

25 U.S.C. Sec. 1911 (a) Exclusive jurisdiction:

> "An Indian tribe shall have jurisdiction exclusive as to any State over any child custody proceeding involving an Indian child who resides or is domiciled within the reservation of such tribe, except where such jurisdiction is otherwise vested in the State by existing Federal law. Where an Indian child is a ward of a tribal court the Indian tribe shall retain exclusive jurisdiction notwithstanding the residence or domicile of the child."

Domicile of minor found to be within reservation and thus exclusive jurisdiction conferred on tribal court: Matter of Appeal in Pima County, 635 P.2d 187 (Ariz. App.1918), cert.denied, 455 U.S. 1007 (1982). If an Indian child is domiciled on a reservation that has exclusive jurisdiction a state court has no subject matter jurisdiction over that child and a motion to dismiss any pending state court

case would be appropriate. Domicile and residence are used in the disjunctive in the ICWA, and an Indian child may be located physically off the reservation but still be domiciled within. Appeal in Pima County, supra.

II.

THE WATERTOWN TREATY OF 1776 CONFERS SPECIAL STATUS ON THE MIC MAC NATION

In 1776 the Mic Mac Nation entered into a treaty with the Commonwealth of Massachusetts. This is an unpublished treaty. The Treaty remains a legally recognized document. The Treaty is considered one of the first international treaties in United States history. In 1987 the Commonwealth of Massachusetts renewed and re-enacted the Treaty of Watertown.

The Mic Macs have a special

relationship with the United States as they were the first Indian nation to be recognized by the United States.

A small Mic Mac community or band in the State of Maine is currently proceeding with a petition for federal recognition with the Secretary of the Interior. Should this recognition status be granted all Mic Macs would be covered under the eligibility requirements of the ICWA

III.

Counsel for the parents has submitted a list of all of the Indian Tribes officially recognized as being entitled to services as set forth in the Federal Register, and a review of this list reveals that the Mic Mac Nation in Maine was not included as a recognized Tribe to receive services from the Bureau of Indian Affairs. Counsel argues that this automatically excludes the Mic Mac Tribes from the class of persons protected under the act. This Court finds that the

exclusion of the Mic Mac Nation was not intended to be all inclusive for two reasons: First a denial of any Bona Fide Tribe from the special status of Indians would be a denial of equal protection of the law as an arbitrary classification; secondly, the Mic Mac Nation, is a Tribe of Indians partially located in the State of Maine is a part of the same Mic Mac Nation also located in Canada. The status of the said Tribe, by virtue of the Treaty of the Watertown Treaty, Wednesday, July 17,1776, and having been recognized by Congress as recent as June 22,1987 (Exhibit D,brief submitted by Betty G. Barrington). In addition thereto the Treaty of Ghent, (Exhibit B, same brief) clearly grants to the Mic Mac Tribe of Canada the same status as the Indian Tribes in the USA and said tribe is entitled to the same protective umbrella that is recognized by the U.S. Government.

FINDINGS OF FACT

The Court finds that:

1. Notice has been given as required by law;

2. Minor, WHAMONIE PAUL, was born on August 13,1987, to MARY VERONICA PAUL, who is a Canadian citizen and a registered Indian. Miss Paul is also a member of the Membertou Indian Band of the Mic Mac Nation in Nova Scotia, Canada, within the meaning of the Indian Act, Chapter 27, Statutes of Canada (1985).

3. Minor, WHAMONIE PAUL, is entitled to be registered as an Indian in Canada in accordance with the Indian Act, Statutes of Canada (1985);

4. Mother, MARY VERONICA PAUL, desires that the Court decline jurisdiction and release her child, WHAMONIE PAUL, a minor, to the Mic Mac Nation for placement with a native family in Canada;

5. The domicile and permanent residence of MARY VERONICA PAUL is in the Membertou Indian

Nation, Sidney, Nova Scotia, Canada and the Mic Mac tribes in Canada and the State of Maine are branches of the Membertou Tribe.

6. Mother, MARY VERONICA PAUL, has only been physically present in the Los Angeles, California area for approximately one and one half (1-1/2) years;

7.There are three treaties in force between the United States and Canada which regulate Indian relations between the two nations as follows:

(a) The Treaty of Watertown;

(b) The Treaty of Amity, Commerce and Navigation (The Jay Treaty of 1794); and

(c) The Treaty of Ghent;

8. The Mic Mac Indian Nation from the State of Maine has been recognized by the United States in the Watertown Treaty of 1776, which treaty is still in force;

9. The Commerce Clause of the United States Constitution grants Congress plenary power

over Indian Affairs and as such is the basis for the Indian Child Welfare Act, 25U.S,C. 1901, et seq.;

11. It is the policy of this Nation to foster the unique values of Indian Culture. Indian Tribes are soverigns predating the United States Constitution and our Courts recognize a trust relationship between the United States and the Indian Nations;

12. The Legislature has, from time to time, enacted certain regulations to ensure the protection of the special status of Indian Nations;

13. The Mic Mac Nation constitutes an Indian tribe in both a racial and cultural sense since at least 1776, has had a long affiliation with the United States and provided military support during the American Revolution.

14. The Mic Mac tribe from the State of Maine nor the Mic Mac tribe from Nova Scotia are not registered with the Secretary of Interior.

This Court orders that the minor child be returned to the Mic Mac tribe in Canada; that the said tribe is protected under the ICWA; that this Court does not have further jurisdiction since the Mic Mac tribe has duly complied with all requirements for the exercise of jurisdiction under ICWA.

That the Court grants a 30-day stay in order to permit the co-counsel to seek a Writ of Review; at the end of 30 days the child will be returned back to the Indian tribe unless the Court of Appeals issues a stay of this order.Stay expires on August 15 1988.

DATED: 7/14/88

ERNEST O. WILLIAMS
Judge of the Juvenile Court

WATERTOWN TREATY

Wednesday, July 17, 1776

The Council and the Indian Delegates being met, Duplicates of the Treaty fairly writter were produced and signed and exchanged.

Then the Honble Benjn Greenleaf Esqr told them the presents ordered them by the Covernment, would be delivered to them as soon as they were ready. The Conference being now ended, the Indians took leave of the Council and departed.

The following is a copy of the Treaty above referred to, Viz. - A Treaty of Alliance and Friendship entered into, and concluded by and between the Governors of the State of Massachusetts Bay, and the Delegates of the St. John's and Mickmac Tribes of Indians.

Whereas the United States of America in General Congress Assembled have in the name and by the Authority of the Good people of these Cclonies solemnly

published and declared that these united colonies are, and of right ought to be free and Independent States; that they are absolved from all Allegience to the British Crown, and that all political connector between them, and the state of Great Britain is and ought to be dissolved; and that as Free and Independent States they have full power to Levy War, conclude Peace, contract Alliances establish Commerce and to do all other Acts, and things which Independent States right to do.

We the Governors of the State of Massachusetts Bay do by virtue thereof, and by the Powers vested in us enter into and conclude the following Treaty of Friendship and Alliance Viz -

1st We the Governors of the said State of Massachusetts Bay in behalf of the said State and the other United States of America on the One part, and Ambrius Var,

Newell Wallis, and Francis Delegates of the St. John's Tribe, Joseph Deneguarra, Charles, Mattahu Antrane, Nicholas, John Battis, Peter Andre and Sabattis Netobcobwit, Delegates of the Mickmac Tribes of Indians inhabitating within the Province of Nova Scotia for themselves, and in behalf of said Tribes on the other part do solemnly agree that the people of the said State of Massachusetts Bay, and of the other United States of America and of the said Tribes of Indians shall henceforth be at peace with Each other, and be considered as Friends and Brothers united and allied together for their mutual defence safety and Happiness.

2nd. That each party to this Treaty shall, and will consider the Enemies of the other as Enemies to themselves, and do hereby solemnly promise and engage to and with each other, that when called upon for that purpose, they shall, and will, to

the utmost of their abilities, aid and assist each other against their public Enemies, and particularly, that the people of the said Tribe of Indians shall and will afford, and give to the people of said State of Massachusetts Bay and the people of the other United States of America during their present war with the King of Great Britain, all the aid and Assistance in their power. And that they the people of said Tribes of Indians shall not, and will not directly or indirectly give any aid, or assistance to the Troops or Subjects of the said King of Great Britain, or others adhearing to him or hold any Correspondence, or carry on any commerce with them during the present war.

3rd. That if any Robbery, or outrage happens to be committed by any of the Subjects of the said State of Massachusetts Bay, or any of the other United States of America, upon any of the people of said

Tribes, the said State shall upon proper application being made, cause satisfaction, and restitution speedily to be made to the party injured.

4th. That if any Robbery or outrage happens to be Committed by any of the said Tribes of Indians upon any of the subjects of said State or of any other of the United States of America, the Tribe to which the Offender or Offenders shall belong, shall, upon proper application being made, cause Satisfaction and Restitution speedily to be made to the Party injured.

5th. That in case any misunderstanding, Quarrel or Injury shall happen between the said State of Massachusetts Bay, or any other United States of America, and the said Tribes of Indians, or either of them, no private Revenge shall be taken, but a peaceable application shall be made for Redress.

6th. That the said Tribes of Indians shall and will furnish and supply 600 strong men out of said Tribes or as many as may be, who shall without delay proceed from their several homes up to the Town of Boston within this State, and from thence shall March to join the Army of the United States of America now at New York under the immediate command of his Excellency General Washington, there to take his orders.

7th. That each of the Indians who shall by their respective Tribes be appointed to join the Army of the United States of America shall bring with him a good Gun, and shall be allowed one Dollar for the use of it; and in case the Gun shall be lost in the service shall be paid the value of it. And the pay of Each Man shall begin from the time they said from Machias for Boston, and they shall be supplied with provisions, and a

Vessel or Vessels for their passage up to Boston, and they shall be supplied with provisions, and a Vessel or Vessels for their passage up to Boston. Each private Man shall receive the like pay as is given to our own private men. The Indians shall be formed into Companies when they arrive in Boston, and shall want them not exceeding the term of three years, unless General Washington and they shall agree for a longer time. And as Joseph Denaquarra Peter Andre & Sabattis Netobcowit have manfully and Generously offered to enter immediately into the War they shall be sent as soon as may be to Genl Washington to join the Army, and shall be considered as entering into our pay at the time of arrival at New York.

8th. The Delegates above named, who may return to their Homes, do promise and engage, to use their utmost influence with the Passamaquoddy and other Neighbouring Tribes of Indians to Persuade

them to furnish, and supply for the said service as many strong men of their respective Tribes as possible, and that they come along with those of the Tribes of St. John's Mickmac -

And the said Governor of the said State of Massachusetts Bay do hereby engage to give to such of the Passamaquoddy or other Neighbouring Indians, who shall enter into the service of the United States of America, the same pay and encouragement in every particular, as is above agreed to be given to the St. John's or Mickmac Indians, and to consider them as our friends and brothers.

9th. That the said State of Massachusetts Bay shall, and will furnish their Truckhouses at Machias as soon as may be with proper Articles for the purpose of supplying the Indians of said Tribes with the Necessaries and Conveniences of Life.

10th. And the said Delegates do hereby annul and make Void all former Treaties by them or by others in behalf of their respective Tribes made with any other power, State, or Person, so far forth as the Same Shall be repugnant to any of the Articles contained in this Treaty.

In Faith and Testimony whereof we the said Governors of the Said State of Massachusetts Bay have signed these presents, and caused the Seal of the said State to be hereunto affixed, and the Said Ambrius Var, Newell Wallis and Francis, Delegates of the St. John's Tribe, Joseph Denaquara, Chares Mattahu, Ontrane, Nicholas, John Battis, Peter Andre and Sebattis Netobcobwit, Delegates of the Mickmac Tribes of Indians have hereunto put their marks, and Seals in the Council Chamber at Watertown in the State aforesaid the nineteenth day of July in

the year of our Lord One Thousand Seven

Hundred and Seventy-Six.

James Bowdoin
B. Greenleaf (Ambrius X Var and Seal)
Caleb Cushing
Richd Derby Junr (Newell X Wallis and Seal)
John Winthrop
Thomas Cushing
John Whitcomb (Francis X and Seal)
Eldad Taylor
Saml Horton (Mattahu X Ontrane and Seal)
Moses Gill
John Taylor (Nichola X and Seal)
Benjn White
Ebenr Thayer Junr (John X Battis)
Henry Gardiner
Daniel Hopkins (Charles X and Seal)
Daniel Davis
Jabez Fisher (Peter X Andre and Seal)
Joseph X Danaquara and Seal)
Sabattis X Netobcobwit and Seal)

No. ___

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

MIC MAC NATION

Petitioner,

v.

DONALD JAMES GIESLER,
DEBORAH GIESLER,
DEPARTMENT OF CHILDREN'S SERVICES
OF LOS ANGELES COUNTY,
MARY PAUL,

Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE
STATE OF CALIFORNIA

PROOF OF SERVICE

I, Jaime M. Cervantes, attorney for Petitioner, business address 854 West Adams Blvd., Los Angeles, California, 90007 (213) 748-8294, certify that I am over the age of 18, am not a party to the action, and on May 17, 1990 I served the Petition for Writ of Certiorari upon the parties below by placing a copy in an envelope and mailing it first class, addressed as follows:

Randall B. Hicks Esq. (Attorney for the
1940 W. Orangewood Ave. Gieslers)
Suite 203
Orange, CA 92668

Honorable Ernest O. Williams
Los Angeles County Juvenile Court,
Dept. 239
210 W. Temple Street
Los Angeles, CA 90012

Jill Bojarski Esq. (Attorney for mother)
920 W. 17th Street, Suite C
Santa Ana, CA 92706

DeWitt W. Clinton, County Counsel
Attn: Charles Nickell Esq.
210 W. Temple Street
9th Floor
Los Angeles, CA 90012

Executed May 17, 1990 in Los Angeles, California under penalty of perjury of the laws of the State of California.

Jaime Cervantes
JAIME M. CERVANTES

(2)

No. 89-1861

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1989

---

MIC MAC NATION,

Petitioner,

v.

DONALD JAMES GIESLER, et al.,

Respondent.

---

# BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI (From the Court of Appeal of The State of California)

---

RANDALL B. HICKS
1940 W. Orangewood Ave., Suite 203
Orange, California 92668
(714) 978-2588
Attorney for Respondents
Donald James Giesler and
Deborah Arlene Giesler

No. 89-1861

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Deborah Arlene Giesler.

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# TABLE OF AUTHORITIES



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TABLE OF AUTHORITIES (Continued)

## STATEMENT OF THE CASE

The Statement of the Case as provided by Petitioner in its Petition for Writ of Certiorari is essentially accurate, although some omissions of certain facts result in a Statement of the Case less that fully informative. In the interests of judicial economy, Respondent hereby incorporates by reference the Opinion of the court of appeal of the State of California, specifically the section entititled "FACTS," and contained in the Petition for Writ of Certiorari, p. 2a, 3a-I7a.

## ARGUMENT

### I

### CONSIDERATIONS GOVERNING REVIEW ON A WRIT OF CERTIORARI DEMONSTRATE THE APPROPRIATENESS OF DENYING THE PETITION FOR WRIT OF CERTIORARI

The court decision from which the Writ is sought is not in conflict with

any decision of this Court, any United States court of appeal, or state court of last resort. Neither does the decision conflict in any way with the clear language of the Indian Child Welfare Act, 25 U.S.C. 1901 et. seq. (hereinafter "the Act").

The Petitioner, Mic Mac Nation of Nova Scotia, Canada, has phrased the issues in their "Questions Presented" in a manner Respondents respectfully submit virtually ignores by ommision the primary and dispositive issue in the case, which is whether or not an Indian tribe not located in the United States and not recognized by the Secretary of the Interior is eligible for the benefits of the Act. Instead, the Petitioner implies conflict with this Court's recent ruling in Mississippi Band of Choctaw Indians v.

Holyfield 490 U.S. ____, 109 S.Ct. 1597, 104 L.Ed. 2d 29, (1989) regarding domicile of the Indian parent. This issue is not even reached in the present case until the threshold issue of the Mic Mac tribe's eligibility of the Act is met. Most importantly, a review of the California court of appeal's decision (contained it the Petition for Writ of Certiorari at page 2a) demonstrates the court's respectful and repeated citing of Holyfield, supra, and its unequivocal following of that decision.

The Petitioner also misstates the law in effect by omitting any reference to the sections of the Act and Code of Federal Regulations dealing with tribal eligibility for the Act. This is most simply seen by a review of Petitioner's Table of Authorities, where the only

citation to the Act is one section regarding domicile. Respondents shall briefly present those sections of the Act and interpreting federal codes addressing this issue.

Respondent noted noncompliance with the Court Rules in the Petition for Writ of Certiorari in that:

(1) Statutes were not provided i full and two of three cited treaties were not provided. Rule 14,1(f);

(2) Only one copy of the Petition was served on Respondent, not three. Rule 29.3;

(3) No notice was ever received by Respondent regarding the date of filing and docket number. Rule 12.1.

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## II

## THE DISPOSITIVE THRESHOLD ISSUE BEFORE THE LOWER COURT WAS WHETHER AN INDIAN TRIBE, LOCATED IN NOVA SCOTIA, CANADA, AND UNRECOGNIZED BY THE SECRETARY OF THE INTERIOR, IS ELIGIBLE TO RECEIVE BENEFITS OF THE INDIAN CHILD WELFARE ACT

The Mic Mac Tribe intervening in this action, of which the minor's mother is eligible for membership, is located in Nova Scotia, Canada. There is no ambiguity regarding the fact that only American Indian tribes are entitled to the benefits of the Act and the exclusive jurisdiction over children which may flow therefrom when reservation domicile is established. Just as surely, however, as Congress lacks plenary power to legislate over Canadian Indian tribes, is the Canadian Indian tribe's lack of right to benefit from American Indian programs.

The Act, in defining its own terms

and scope, limits its applicability to "Indian tribes." 25 U.S.C. section 1903(8) defines "Indian tribe" to mean "any Indian tribe, band, nation or other organized group or community of Indians recognized as eligible for the services provided to Indians because of their status as Indians, including any Alaska Native village as defined in section 1602(c) of Title 43." (Emphasis added.) "Secretary" is defined as the Secretary of the Interior. 25 U.S.C. section 1903(1).

Federal regulations interpreting the Act leave no room for doubt that only "recognized" American tribes are covered by the Act. 25 C.F.R. 83.2 provides that "the purpose of this part is to establish a departmental policy and procedure for acknowledging that certain American

tribes exist. Such acknowledgment of tribal existence by the department is a prerequisite to the protection, services and benefits from the federal government available to Indian tribes. (Emphasis added). 25 C.F.R. 83 sets forth "Procedures for Establishing that an American Indian Group Exists as an Indian Tribe." Section 83.1(f) states that "Indian tribe" means "any Indian group within the continental Unites States that the Secretary of Interior acknowledges to be an Indian tribe." Section 83.4, entitled "Who May File," states that "any Indian group in the continental United States believing it should be acknowledged as a tribe and satisfying statutory criteria can petition the Secretary. The Secretary of the Interior is entitled to make reasonable

classifications and set eligibility requirements. Morton v. Ruiz 415 U.S. 199, 230-236, 94 S.Ct. 1055, 39 L.Ed. 2d 270(1974).

25 C.F.R. 83.6(b) requires the Secretary to publish in the Federal Register all Indian tribes recognized and eligible to receive services from the Bureau of Indian Affairs. Accordingly, 51 Fed. Reg. No. 132, Thursday, July 10, 1986, lists "Indian Tribal Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs." This was the most current Federal Register listing at the time of trial. Neither Mic Mac tribe appears on that listing. Neither does either tribe appear on any subsequent Federal Register listing.

The Petitioner makes much about the

fact that there is a Mic Mac Indian tribe located in Maine, thus within the United States. This tribe is also not recognized, however. Even if it were recognized, there was no evidence presented at trial, or in any subsequent proceeding, that the two tribes were affiliated or that the minor's mother's membership in the Nova Scotia Mic Mac tribe made her or the child eligible for the Maine Mic Mac tribe. No appearance, or contact of any type, was made during any of the proceedings below by a representative of the Maine Mic Mac tribe. Petitioner sought, and received, an order from the trial court sending the child to the Mic Mac tribe in Canada, not Maine.

Petitioner states that it is unjust to deny the Act's privileges to the Mic

Mac tribe simply because they are unwilling "to go through the lengthy and arduous procedure, in order to be placed on the (Secretary of the Interior's) listing." Such is hardly a noble argument, in effect stating: "petitioning for recognition is too much trouble but award us the Act's privileges anyway." In examining the guidelines contained within the Code of Federal Regulations governing recognition and eligibility for the Act, it is clear that many critical factors are examined beyond a group's Indian ancestry. 25 C.F.R. 83.7 provides these guidelines for the Secretary of the Interior: Tribal means of identifying those eligible for membership, existence of a tribal court and its guidelines, conformity with the Indian Civil Rights Act, past tribal

recognition by the government, form of tribal government, existence of a tribal constitution and bylaws, existence and size of the tribal reservation, but to list but a few.

The critical necessity to awarding only those tribes worthy of the Indian Child Welfare Act's privileges the necessary recognition is the tremendous power that exclusive jurisdiction governing children can wield. Such power, superceding state child welfare laws in many instances, could destroy the lives of Indian children and parents if determined the tribal government is not prepared for such responsibility.

Petitioner's last answer to its lack of recognition is the existence of three treaties, the Treaty of Amity from 1794, the Treaty of Ghent from 1814 and the

Treaty of Watertown from 1776. The first two do not even deserve extensive comment. The Mic Mac tribe was not a party to the treaties, nor were they even mentioned in any way. The treaties were between the United States and Great Britain, not any tribe. Most importantly, the treaties had nothing to do with child welfare, rather dealt with navigational rights in the Mississippi river and a cessation of hostilities between the United States and tribes with whom it was at war, respectively. If the Mic Mac tribe deserves recognition and the Act's privileges based upon that "relationship," or lack thereof, with the United States government, then every other tribe located in Canada could make the same argument. Notably, Petitioner did not provide a copy of the treaties in

the Petition for Writ of Certiorari's appendix, defeating easy review.

The only treaty to which the Mic Mac tribe was apparently a party is the Watertown treaty (the treaty refers to "Mickmac" Indians, rather than Mic Mac Indians). In the trial court Petitioner provided this was an "unpublished" treaty and was unable to provide to the court its terms (Petition for Writ of Certiorari, "Statement of Decision and Judgment of Trial Court," page 42a, 48a), seemingly waiving the opportunity to produce a copy subsequent to the trial court's ruling. Regardless, the treaty was entered into by the Governors of Massachusetts Bay, not the United States government. It cannot be disputed that states do not have the authority to enter into treaties on behalf of the federal

government. Of greatest importance is the fact the terms of the treaty dealt with the use of troops during the war existing at that time, not child welfare.

It could be that the treaty has some validity regarding the scope of the treaty, but it is preposterous to allege that the modern, specific and self-limiting scope of the Indian Child Welfare Act is circumvented by such treaties with absolutely no nexus to the issues governed by the Act. Indeed, Petitioner's contention that the mere existence of such "recognition" by the United States government (actually the Commonwealth of Massachusetts) in the existence of the Watertown Treaty accords the privileges of the Act in and of itself is completely illogical. 25 C.F.R. 83.7 lists "past tribal

recognition by the government" as only one consideration among many in making a determination regarding eligibility.

Clearly, mere recognition in some general sense is not intended to circumvent the critical eligibility analysis. If such were the case the federal government could not deal in any formal way regarding any issue with any Indian tribe or foreign Indian entity without defeating the clear intentions of the Act regarding eligibility for very special and specific privileges, and nothing is more important than those controlling the lives of children.

III

THE MINOR WAS NOT RESIDING OR DOMICILED ON THE RESERVATION

Even if the Mic Mac tribe were found to be eligible for the privileges of the Act, exclusive jurisdiction would not

result unless the minor resided or was domiciled on the reservation. 25 U.S.C. 1911(a). A bona-fide "Indian child" covered by the Act but not domiciled or residing on the reservation may stay in the state court system if desired by the Indian parent (who here opposes tribal jurisdiction and desires the child to be adopted by the parents she selected and with whom he has been living his entire life). 25 U.S.C. 1911(b). Additionally, 25 U.S.C. 1912(e) and (f) provide special considerations for a child who would suffer serious emotional or physical injury if sent to the tribe. Here, where the child has lived with the adoptive parents since birth and required extra-ordinary parenting due to the need for many past and future surgeries resulting from problems at birth, there is no

question as to the serious detriment in uprooting him and sending him 3,500 miles away to another country and an alien environment.

Petitioner's Petition, in its "Questions Presented" asks whether "domicile" "requires that a Mic Mac mother reside continuously, prior to and subsequent to the birth of the Indian child." This implies the California court of appeal ruled that all three conditions were required for domicile to be found. To the contrary, the court reiterated this Court's decision in Mississippi Band of Choctow Indians v. Holyfield 490 U.S. ____, 109 S.Ct. 1597, 104 L.Ed. 2d 29 (1989).

The facts of the instant case bear little resemblence to those in Holyfield, supra. In Holyfield, both Indian parents

resided and were domiciled on a reservation but travelled 200 miles away from the reservation to give birth with the express intent to place the child for adoption and defeat the exclusive jurisdiction of the Act based upon domicile. Mississippi Band of Choctow Indians v. Holyfield 490 U.S. ____, 109 S.Ct. 1597, 1610, 104 L.Ed. 2d 29 (1989).

In the present case, the minor's mother did not drive 200 miles away to simply to give birth: She relocated 3,500 miles away in another country. She lived in Los Angeles, California, approximately one year before conception, conceived the child in Los Angeles, gave birth in Los Angeles, and continued to reside in Los Angeles for at least ten months after the birth. See Petition for

Writ of Certiorari, "Opinion of California Court of Appeal," page 30a. Furthermore, prior to living in Los Angeles, it appears that she lived in Boston for several years as she received her G.E.D. high school equivalent degree there, as well as married and divorced (five years after the marriage) there. See Petition for Writ of Certiorari, "Opinion of California court of appeal," page 6a. It appears that the minor's mother has continued to live away from the Mic Mac tribe as Petitioner's Petition is silent regarding her present residence. Respondents are informed and believe she is, and for more than one year has been, living somewhere in Canada, away from the reservation.

It is not disputed that unborn children conceived outside of marriage

generally assume the domicile of the mother. Here, the mother's residence was without doubt Los Angeles. Although residence does not always indicate domicile, it is a primary consideration. Following this Court's guidelines as set forth in Mississippi Band of Choctaw Indian Band v. Holyfield 490 U.S. ____ 109 S.Ct. 1597, 1608, 104 L.Ed. 2d 29 (1989) that "physical presence in a place in connection with a certain state of mind concerning one's intention to remain there" indicates domicile, there is no room for doubt that Los Angeles, not the reservation in Nova Scotia, Canada, was her residence and domicile at birth, thus that of the child.

California properly has jurisdiction over the Canadian Indian tribe based upon the minor's conception in Los Angeles,

birth in Los Angeles, his American citizenship (and his rights flowing therefrom) resulting from his birth here, and his continued residence in Los Angeles since birth.

## IV

## CONCLUSION

Before this Court is Petitioner, an Indian tribe not recognized by the Secretary of the Interior and not located in the United States. The tribe claims not only eligibility of the Act, but exclusive jurisdiction over the child based upon his alleged reservation domicile as well. This is despite the uncontested facts that the mother lived in Los Angeles prior to conception of the child, conceived the child in Los Angeles, gave birth in Los Angeles, lived in Los Angeles for at least ten months

after birth, and still does not make the reservation her home. She herself informed the court of appeals her residence and domicile was Los Angeles at birth. Unlike the facts in Holyfield, there was no deception planned, rather a simple change of domicile.

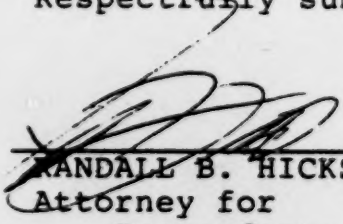
Respondents and hopeful adoptive parent, Donald and Deborah Giesler, met the minor's mother through a licensed California Adoption Agency, Christian and Family Adoption Agency, where she choose them as adoptive parents. Although she vacillated for a short time, she desires that they adopt her child without interferrence from the tribe. The child has bonded to the Gieslers. They have fed, bathed, sheltered him and given him the love a child needs, especially considering his extra-ordinary needs due

to his past serious medical problems and surgeries (colostomy etc.). They have taught him to walk. They have taught him to talk. They are the only parents he has ever known. They are "Mom" and "Dad." To uproot him to a strange environment, 3,500 miles away, in another country and away from the only family he has ever known is beyond any child's worst nightmare.

Respondents respectfully pray that the Petition for Writ of Certiorari be denied.

DATED: July 18, 1990

Respectfully submitted,



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